



FIELD OF APPLICATION OF ALGERIAN COMPETITION LAW TO INTERNATIONAL DISTRIBUTION CONTRACTS (Model Trade Concession Contract)

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ABSTRACT

The astonishing expansion of the global market and its trend towards globalization and the spread of international contracts have led to the emergence of international distribution channels aimed at achieving economic development and, thus, to the need for the Algerian market to integrate with these economic developments by creating an economic environment commensurate with these contracts considering free competition.

The franchise contract is one of the international distribution contracts that contribute significantly to the development of developing countries by expanding the spread of major brands across the world, but these contracts are subject to some competitive legal conditions to avoid competition in the market.

Through this study, we will learn about the concept and types of commercial concession contract and the scope of application of the provisions of the Algerian competition law to it.

INTRODUCTION

Distribution occupies an essential place in international economic exchanges, as it contributes to the promotion and delivery of goods or services to consumers around the world, so distribution contracts are a marketing tool aimed at improving communication between a particular product and its potential buyer.¹ Distribution appears as a stage of economic activity between production and consumption.

Distribution is “the process of delivering products to the final consumer, through a group of institutions. It is considered one of the main marketing functions and aims to deliver goods after completion of production to the last consumer, and the routes they take from producer to consumer or user are called distribution networks.”²

Franchise contracts are one of the most prominent international contracts that have contributed significantly to economic development in developing countries, spreading major brands across the world and benefiting consumers from them. However, such contracts may constitute restrictive practices of competition when abused and may include advantages for the producer regulating the network, while harming the economic situation of the distributor of this network. While this method allows producers to follow a comprehensive trade policy, exercise control over their products despite the multiplicity of their sales centers in the market and ensure a harmonious service to consumers, distributors are in a subordinate position towards the producer and are forced to respect the contractual terms imposed on them by the producer and are forced to respect the contractual conditions imposed on them by it. Most legislations, therefore, regulate competition rules applicable to such contracts to avoid producer abuse and to maintain the good conduct of competition.

The importance of this study lies in the spread of commercial franchise contracts significantly at present and their effective role in contributing to the economic progress of developing countries, in addition to the interest of most legislation, includ-

ing Algerian legislation, in the application of competitive legal provisions commensurate with the economic value of these contracts.

This study aims to define the concept of franchise contracts with their types, and highlight the role of Algerian competition law in regulating these contracts to maintain free competition and the good functioning of the market.

Based on the above, we can raise the following problem: How effective are the provisions of the Algerian competition law in regulating franchise contracts?

To answer this problem, we will discuss in the first axis of this study the concept of commercial franchise contracts and their types, while in the second axis, we will learn about the field of application of Algerian competition law to these contracts, following the comparative analytical approach.

1. THE CONCEPT OF THE COMMERCIAL FRANCHISE CONTRACT AND ITS TYPES

There are many concepts of the franchise contract and its types, and it is worth defining the concept of the commercial franchise contract before identifying its different types.

1.1. The Concept of the Franchise Contract

A franchise contract is an agreement through which the owner of a particular mark is granted the right to use the latter by an independent economic agent. The mark means “the distinctive feature that the merchant places on the products he manufactures, which is a factory mark, to distinguish them from other similar products offered on the market.”³ The jurisprudence also defines the concession contract⁴ as “a contractual means of co-operation among independent projects, which depend on the transfer of technical and commercial

1 A. Thalmann, The protection of Networks Distribution against Trade parallel: Study Compared rights European, French, English, German and Switzerland, L.G.D.J., France, 2001, p. 06.

2 Sh. Al-Askari and K.E. Al-Kanaani, Distribution, Wael Publishing House, Oman, 2004, p. 10.

3 J. Bussy, Business Law, Dalloz, France, 2001, p. 376.

4 F. Zerawi advantage Full in law Commercial, Intellectual Property Rights: Industrial Property Rights Commercial, Literary Property Rights and artistic, Ibn Khaldun Publishing, Algeria 2006, p. 201.

knowledge and associated intellectual and industrial property rights, and technical assistance from the donor to the recipient who exercises his activity in accordance with the standards and conditions of The donor places them in exchange for material performances of the latter, to replicate the success achieved by the donor in his business.”

Another aspect of jurisprudence defines it as an agreement through which the producer undertakes to put in the possession of the distributor⁵ a trade name or mark that ensures its exploitation in the best conditions. Some argue that it is a distribution contract that combines an enterprise with a mark or logo with one or more independent traders.⁶

Hence, the benefits of the franchise contract are evident to us, as the supplier benefits from the latter by expanding the geographical scope of the Muntaja mark due to its reuse in other geographical areas, and the distributor obtains expertise and skills while maintaining his independence, and the consumer in turn benefits from the quality of the product.⁷

Although the franchise contract is similar to the selective distribution contract through the desire to unify the conditions for marketing a high-quality product or service and expand the spread of major brands across different countries of the world, it differs from it in that the supplier does not select its network members within the scope of the franchise contract according to specific criteria, but this agreement assumes that the supplier has sufficient skill before establishing his network to exploit it by distributors.⁸

The franchise contract is based on an essential criterion, which is the transfer of “skill”, and the latter is defined as a set of practical knowledge that is, transferable, not immediately accessible to the public, unlicensed and granted to those who

are fluent in this group a competitive advantage.⁹ Skill is defined in European legislation as a confidential, substantial and identical collection of unauthorized practical information, resulting from and tested by the supplier.¹⁰

The exploitation of the mark is permitted through the “trademark exploitation license”, which is defined as “the contract by which the owner of the mark agrees to grant third parties the right to exploit it in whole or in part, exclusively or not, in exchange for payment of an appropriate exploitation fee called royalties.”¹¹

As for the legal definition of a franchise contract, it is not contained in Algerian law, but the Algerian legislator deals with the provisions of marks in general by Ordinance No. 03-06 on trademarks¹² without referring to the contracts contained in the marks as well as the legal obligations arising from there.

We point out that the commercial concession contract must be distinguished from the commercial license contract, despite the similarity of the concession contract and the licensing contract in the goal of enabling the licensee to market the products of the owner of the mark through the distribution contract, but the commercial license contract is unique in exploiting the mark without the rest of the elements of industrial property,¹³ while the commercial concession contract includes, in addition to the exploitation of the mark, the exploitation of the rest of the industrial property rights, the transfer of technical knowledge and the provision of technical and technical assistance by the¹⁴ grantor.

5 G. Ripert, R. Roblot, Treaty on Commercial Law, T.1, 13th ed., L.G.D.J., France, 2006, p. 367.

6 D. Pialot, The Complete Guide to Franchising, 3rd ed., L'express, France 2007, p. 15.

7 Y. S. Al-Hadidi, The Legal System of the Commercial Franchise Contract, Dar Al-Fikr Al-Arabi, Egypt, 2006, p. 27.

8 M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-AmsselemJ. Vialens, The France Application of Anticompetitive Practices Law, L.G.D.J., France, 2008, p. 163.

9 J-M. Leloup, Franchising: Law and Practice, 3rd ed., Delmas, France, 2000, p. 53.

10 Commission Regulation (EU) No. 330/2010 of 20 Apr 2010 concerning the application of Article 101 § 3 of the T.F.U.E. to categories of vertical agreements and concerted practices, art. 1 (g), J.O.U.E. No L 102/1, 23 April 2010, p. 3.

11 F. Zerawi, previous reference, p.252.

12 of July 19, 2003, G.R. of July 23, 2003, p.44.

13 For example, licensing the exploitation of a mark L'OREAL which do not need to exploit other elements of industrial property.

14 For example, exploiting a mark RENAULT Needs to exploit other technical and technical elements that the donor is obligated to provide to the recipient.

1.2. Types of Franchise Contract

The franchise contract is characterized by the flexibility of its legal system and its easy application to various products and services. It is divided into three categories: service concession contract, production concession contract and distribution concession contract.

1.2.1. Service Concession Contract

This contract aims to supply services bearing a certain mark, through which the licensee is allowed to market certain services under the brand of their owner but to follow the same commercial policy followed by the latter. Such as services that carry a famous mark in the field of hospitality.¹⁵

1.2.1.1. Production Concession Contract

This contract aims to expand the distribution of the product, but it is considered this type of service concession because it is not only commercial technology but also manufacturing technology, thus a complete activity. Such as the owner of the mark builds a factory,¹⁶ but the licensee sponsors it, through his permanent technical presence and by marketing the products he manufactures after obtaining a license to exploit the mark.¹⁷ One of the most important advantages resulting from this system is to bring the place of production closer to the places of sale.

The product concession contract applies to large enterprises, for which this agreement is the only means of exporting products, and what constitutes international commercial operations.¹⁸ It should be noted, however, that the activity of the licensee in this case is not considered a branch of the trademark grantor, but rather an independent business or project under the licensed trade name, but it is characterized by complete symmetry between the brain units damaged in different regions despite the multiplicity of licensees.¹⁹

Therefore, the licensee, in this case, is considered a production institution on the one hand and a market on the other, and therefore, this duplication of activity is the main reason for the lack of this system due to its complex features.

1.2.2.2. Distribution Concession Contract

Through this contract, a product or group of products under a certain label is supplied, and this is the system in force. The licensees in this agreement form vertical structures that allow the circulation of the product from production to consumption, and this system is included in the distribution networks due to the commitment of the institution concerned to ensure the distribution of the product to the final consumer.

2. THE FIELD OF APPLICATION OF COMPETITION LAW TO THE COMMERCIAL FRANCHISE CONTRACT

Despite the importance of franchise contracts of all kinds in achieving economic development and enabling consumers around the world to acquire products and services from major brands, they may affect the integrity of competition through some arbitrary clauses towards distributors that the grantor may include in the contract, which requires the prohibition of such actions in the competition law, but the flexibility of competition rules has led to the application of some exceptions to this prohibition.

We will first learn about the prohibitions of the franchise contract in competition law and then address the exceptions to this prohibition.

2.1. Cases of Prohibition of the Franchise Contract in the Competition Law

Traditionally, in franchise contracts, some clauses are included, such as regional exclusivity and non-competition, and this is reflected in the protection of both the grantor and the recipient of his rights and the way these rights are exercised.

15 G. GUERY, E. SCHONBERG, E-M. LAFORET, Business law for managers, Ellipses, France, 2009, p. 123.

16 J. BUSSY, previous reference, p. 378.

17 G. GUERY, E. SCHONBERG, E-M. LAFORET, previous reference, p. 120.

18 For example, exemption agreements concluded in the field of supplying products with famous brands across various countries, such as Coca-Cola, Kandia... Etcetera...

19 J-M. LELOUP, previous reference, p. 31.

2.1.1. Regional Exclusivity

The terms of exclusivity are one of the most controversial conditions in legal thought because of their impact on the freedom of trade exchange between the different parties, and in what is considered, according to the liberal commercial thought, a restriction on freedom of trade and a reason for monopoly and market division, especially when it comes to the absolute territorial limitation clause through which the licensee is obligated not to market the product of the owner of the mark except in the territory specified by the latter, so we are in the process of restricting competition.²⁰

This clause may limit the freedom of the trademark holder when it comes to the latter's obligation not to conclude similar agreements in the same geographical area specified for the licensee, thus ensuring that the latter is excluded from the exploitation of the same mark by another enterprise. The clause may also aim to restrict the licensee's freedom when the licensee commits not to deal with other suppliers.

It should be noted that within the framework of a network, the trademark holder may impose on its members the sharing of the market among themselves and the need for them to respect these limits or prevent them from making advertisements outside the specified geographical area, which may impede competition among them.²¹ However, the trademark holder can impose an exclusive obligation on the licensee only for skill-related products where such obligation is necessary for their application.²²

The franchise contract can also appear as a restrictive practice of competition by infringing on the freedom of the parties, especially when it comes to the need for the licensee to respect the prices set by the owner of the mark and the need to follow his commercial policy.²³ Such agreements focusing on the imposition of prices by the trade-

mark owner were first addressed by European law authorities in 1986, when the Court of Justice of the European Union showed its desire to avoid preventing licensees from competing among themselves by freely setting prices without the influence of the trademark holder. The European judge considered that the price fixing applied by the owner of the mark constituted a prohibited practice because it restricted the freedom of licensees and, thus, competition.²⁴

The means of control granted to the trademark holder vis-à-vis the licensee may also become a tool that restricts the freedom of network members to set prices since the licensee is obliged to follow the instructions of the trademark holder.²⁵

The Algerian legislator has prohibited exclusive contracts under Article 06 of Act No. 08-12, amending and supplementing Ordinance No. 03-03 on competition, which stipulates²⁶ that: "It is considered an obstruction, limitation or breach of the freedom of competition, and prohibits any act and/or contract, whatever its nature and subject matter, that allows an enterprise to monopolize the exercise of an activity within the scope of application of this order."

While European law defined exclusive distribution as any direct or indirect obligation imposed on a supplier to sell its products or services specified in the contract to a distributor located within the European Union, the²⁷ EC Court confirmed that exclusivity agreements that produce weak effects on competition are not included in the prohibition.²⁸

Thus, exclusive distribution consists of the supplier's acceptance of the sale of a product to a certain category of distributors to resell it in a particular territory and for a certain period, and at the same time, the distributors are obliged to respect these terms, and the restriction of freedom is manifested by the obligation of the producer to supply his products to certain distributors only.

Therefore, the franchise contract constitutes a vertical restriction of competition due to its con-

20 Y. S. Al-Hadidi, previous reference, p. 232.

21 J-M. LELOUP, previous reference, p. 72.

22 C. POUND STERLING, the development of the protection afforded to the franchisee in its relations with the franchisor at the stages of performance of the contract and its termination, thesis of Ph.D., University of Lille 2 – Law and health, Faculty of Legal, Political and Social Sciences, Doctoral School, 2010-2011, p. 30, No. 74: www.edoctorale74.univ-lille2.fr

23 G. GUERY, E. SCHONBERG, E-M. LAFORET, previous reference, p. 43.

24 C.J.E.C. 28 Jan. 1986, Pronuptia Back: www.eur-lex-europa.eu.

25 T. GRANIER, previous reference, p. 4.

26 of June 25, 2008, G.R. issued on 02 July 2008, p. 36.

27 Art. 1he Commission Regulation (EEC) No 2790/99 of 22 Dec. 1999, OJ L 336 of 29 Dec. 1999.

28 Commission Communication C.E. No 97/C 372/04, OJ EC 9 Dec. 1997, No C 372, p. 13.

tribution to reducing the chances of new competitors to entering the market or maintaining their competitive position through the restrictive supply clauses they need to ensure effective competition in the market.²⁹

Accordingly, it is required that the exclusivity be specific in terms of time and place, as the condition of a complete minority is considered a prohibited condition due to its restriction of competition, and if the commercial concession contract includes such a condition, the Competition Council can intervene in this case to take the necessary measures to put an end to this prohibited act.

2.1.2. Non-Competition Clause

The non-competition clause is a provision through which one of the contracting parties undertakes not to practice a professional activity competing with the other party, so the obligor is considered in the position of the debtor,³⁰ and his obligation is to refrain from performing an act, which is to compete with the other party who is in the position of a creditor.³¹ Thus, the limitation of the freedom of the competitor lies in preventing him from practicing a certain activity through this clause. Some jurisprudence argues that the non-competition clause leads to the contractual exclusion of the risk of competition, as the supplier resorts to this method to exclude competition risks from the market³².

We point out that the owner of the mark has the right to include the non-competition clause to protect his economic interest, but this must be in accordance with legal conditions, as the clause should not lead to the prohibition of every activity, but only the activity related to that practiced by the beneficiary of the item.³³ The acts prohibited to the debtor must be clearly and accurately defined, and in case of ambiguity, the judge must interpret the clause.

The item must also relate to a specific time and

place. The validity of a non-compete clause is usually set at 5 or 10 years, and in case of non-compliance with the period, it is either reduced or the clause or contract is invalidated.³⁴

2.2. Exceptions to the Prohibition of the Franchise Contract in the Competition Law

The Algerian legislator mentioned some cases in which anti-competitive practices in general are excluded from the ban to avoid freezing the competition law by prohibiting all practices without exception, which leads to the fear of economic customers from invading the market world and their sufficiency with certain practices, which in turn hinders the development of competition.

It also considers an important element of the general economic interest, as exceptional situations appear as a means of achieving economic development when these restrictions coincide with the public interest.

Article 09 of Ordinance No. 03-03 on competition stipulates that the prohibition does not apply to: "...Conventions and practices resulting from the application of a legislative or regulatory text adopted in the application thereof. Authorize agreements and practices whose owners can prove to lead to economic or technical development, contribute to improved employment, or allow SMEs to enhance their competitive position in the market. Only agreements and practices that have been authorized by the Competition Council shall benefit from this provision."

We note from the extrapolation of the text of the article that the Algerian legislator considers the economic progress resulting from the restrictive practice of competition as the effects resulting from these actions may be a means of regulating economic activity, thus obtaining appropriate economic or technical effects.

Although the Algerian legislator does not address a clear concept of economic progress, the latter can be deduced through the results of the economic efficiency expected from the practice, and it is related to the possibility that a restric-

29 J.B. Blaise, previous reference, p. 44.

30 D. LEGAIS, Commercial and Business Law, 13Th ed., Dalloz, France, 2000, p.253.

31 J.B. BLAISE previous reference, p. 323, n° 626.

32 M-A. FRISIAN-ROCHE, M-A. STEPHANE PAYET, Competition law, Dalloz, France, 2006, p. 429.

33 Because there is no competition in case of different activity.

34 Y. GUYON, Business Law: General Commercial Law and Companies, Economica, France, 2001, p. 922.

tive practice of competition can contain positive results, which can manifest itself in various forms, such as improving production through the prohibited practice as a result of the enterprises concerned manufacturing high-quality products at low costs, or by applying how to produce environmentally friendly³⁵ products. Economic progress is also achieved through improved market conditions when the prohibited practice ensures the optimal spread of products or services and, thus, the speed of circulation among consumers.

Economic budgeting is a mean by which it is possible to determine whether a practice is beneficial or harmful by preparing a list of negative effects on the one hand and positive effects on the other,³⁶ as it fulfills the condition of contributing to economic progress when the restrictive practice allows for the renewal of the effectiveness of the market that affects it for the benefit of the parties to the practice on the one hand and the rest of the economic customers and the end consumer on the other.³⁷

In application of the provisions of the article on the commercial concession contract, it is allowed to conclude commercial franchise contracts that restrict competition if they contribute to economic progress, thus benefiting from the exemption regime provided for in article 09 of Ordinance No. 03-03 in view of their positive effects on competition in the relevant market.

The Algerian government has concluded a partnership contract with the French company Renault to establish a tourist car factory exclusively in the city of Oran, which led to the discontent of the European Union countries, due to the conflict of the exclusive concession granted to the French company with the provisions of the Association Agreement concluded between Algeria and the European Union, especially with Article 41 thereof, which enshrines the principle of fair competition and the prevention of exclusivity and monopoly.³⁸

It is noteworthy that the exclusive distribution agreement concluded between the Algerian gov-

ernment and the French company Renault constitutes a violation of article 06 of Law No. 08-12, which prohibits any exclusive agreement of any nature. However, the president of the Algerian Competition Council stated that the partnership agreement³⁹ with France's Renault has contributed to improving production and achieving economic progress in the Algerian market.

CONCLUSION

Through this study, we have noted the effective role played by the franchise contract in achieving economic development, especially for developing countries, by expanding the distribution of major marks for products or services, but despite the importance of this type of contract, it may lead in some cases to restricting competition in the market by excluding the rest of the distributors when the grantor deals with distributors only, which requires the application of the provisions of the competition law to maintain competitive freedom and protect the rights of competitors.

However, since the Algerian legislator does not address the provisions of the franchise contract, it is difficult to determine its legal aspects, which leads to the fear of some investors from dealing with such contracts because there is no tangible legal protection.

We have also observed, through extrapolating the provisions of the Competition Code, that there are some contradictions in the field of distribution contracts in general, especially in the framework of exclusive contracts, where the Algerian legislator prohibits absolute monopolization in the text of article 06 of Law No. 08-12 amending and supplementing Ordinance No. 03-03 on competition, while some exceptions to this prohibition are provided for in article 09 of Ordinance No. 03-03 on competition, which apply to agreements and the position of dominance, knowing that contracts Distribution within vertical agreements that may constitute a restrictive practice of competition.

Hence, we raise the following question: since exclusive agreements can contribute to economic progress, why did the Algerian legislator not apply to them the exemption system provided for in article 09 of Ordinance No. 03-03, instead of limiting

35 Decision of the Cons. Conc. Fr. No. 88-D-20, 3 May 1988, Practices in the salt market, report for 1988, p. 85. www.autauritedelaconcurrence.fr

36 F. DEKEUWER-DAVID Commercial law, 8Th ed., L.G.D.J., France, 2004, p. 456.

37 E. DINEY, previous reference, p. 13.

38 Al-Fajr Daily, January 4, 2016, p. 3.

39 www.Djazairiess.dz 12.01.2017 at 13:50.

the article to agreements preventing them at all in legal texts and applying them on the ground without respecting these texts?

Considering the above, we can propose the following recommendations:

- The need to regulate the commercial concession contract in Algeria under legal texts that define the legal aspects of this contract and the obligations of its parties, with a view to encouraging the conclusion of such contracts in Algeria and thus contributing to economic development and the revival of the national economy.
- Distribution contracts in general, including the concession contract, may be included among the contracts excluded from the prohibition provided for in Article 09 of Ordinance n°. 03-03 on competition if they contribute to economic progress and are not prohibited at all in view of their economic importance.
- The need to amend Article 06 of Act No. 08-12, amending and supplementing Ordinance No. 03-03 on competition by easing the prohibition of the "exclusivity" clause by specifying this clause in terms of time and place.
- Work to develop Algerian importers in terms of expertise in the field of franchise contracts and grant incentives and guarantees to foreign suppliers, with the need to facilitate the administrative and legal procedures for the conclusion of these contracts to avoid bureaucracy that hinders foreign investments.

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